Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

RONALD D. MORGAN,
Petitioner,

vs.

TOWN OF MINERAL,
Respondent.

Appeal of Petition for Rehearing from the Supreme Court of Virginia, Record No. 100409, of Circuit Court of Louisa, Case No.: CL08000293-00.

PETITION FOR WRIT OF CERTIORARI REVIEW

Ronald D. Morgan
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QUESTIONS PRESENTED

1. Whether § vscr-5:17 (a) (1) is equitably fair to all Appellants with special reference to *pro se* litigants, and whether the back to back record snow storms of 2009-2010 constitutes an extraordinary circumstance that should have caused the Virginia Supreme Court to use its discretion to set aside the time limit and reinstate Petitioner's Appeal?

2. Whether it is a miscarriage of justice to procedurally dismiss an appeal by strict enforcement when the Constitutional issue of due process is being presented, including the violation of Commonwealth Statutes, involving the taking of Petitioner's property, when the Court has the discretion to judge the merits of the case?

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Petitioner's Petition for Rehearing

JURISDICTION

The judgment of the Supreme Court of Virginia dismissing Petitioner's Appeal was entered on April 30, 2010. A petition for rehearing was denied on June 18, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

This Court should review Petitioner's Petition for Writ of Certiorari because the decision below conflicts with the decisions of this Court and the Commonwealth of Virginia on the important Constitutional right of Due Process in the taking of property and the unchecked use of police power of a municipality, in consultation with their attorney, to further their ends. This Court should further decide in the interest of clarity whether § vscr-5:17 (a) (1) should be strictly enforced given its construction that fails to make it an equitable and neutral rule to all appellants and *pro se* litigants in particular.

INTRODUCTION

On or about October 12, 2006 the Town of Mineral caused a building located on the real property located at 70-74 Louisa Avenue in the Town Mineral, Virginia to be demolished. The Town acted without authority in demolishing Petitioner's Auditorium building at 70-74 Louisa Avenue, Mineral, Virginia by failing to (1) establish the legal existence of nuisance by the court under Title 48 – Nuisances, or by Virginia Codes § 15.2-900; (2) properly implement Virginia Codes § 15.2-906, and § 15.2-1115 and Mineral Town Code § 5.4 in substituting the Town Council's Resolution for the Court's authority; and (3) provide Petitioner with a pre-deprivation hearing as a part of due process guaranteed under the Fourteenth Amendment of the Constitution of the United States and the Virginia Constitution, Section 11.

The Town also acted in bad faith by restricting Petitioner's option for compliance of the codes cited to

"remove" as opposed to alternatives of "repair or secure" in order to remove the building for aesthetic reasons: (1) by failing in their ministerial duty to inspect Petitioner's work required by codes cited which altered the condition of the property from the original complaint; (2) by acting without authority under the codes cited which gives authority only if the owner fails to abate or obviate conditions cited by the Town; (3) by presuming nuisance conditions remained and worsened without inspecting Petitioner's work by a qualified inspector; (4) by relying on dated information, presumed conditions of nuisance, allegations and assumptions by their structural engineer, unsubstantiated by an interior inspection of the property, in Town Council's Resolution; (5) by failing in their ministerial duty to adequately supervise the demolition of the building to prevent the destruction and loss of property unrelated to allegations of nuisance; (6) by engaging in a more costly demolition process than necessary by removing instead of burning or burying debris; (7) by

doing additional work unrelated to the alleged nuisance and billing Petitioner for that work; and (8) by subsequently placing a lien on Petitioner's property and attaching his bank accounts without providing the Petitioner an opportunity to contest Town's claim for compensation before attaching his accounts.

The acts of Town are not those of simple negligence or omission. Their acts were not limited by time, the availability or opportunity to gather information or an emergency that required immediate action. The cumulative failure of the Town's actions, in consultation with their attorney, by failing: (1) to act with authority, (2) to act in good faith, (3) to provide Federal and State Constitutional rights of due process, and (4) to protect Petitioner's personal property have demonstrated a willful abuse of authority which rises to the standard of gross negligence in the taking of property. In cases of gross negligence and violation of Constitutional rights, the Town is not entitled to immunity

from liability under Virginia or Federal laws which they have claimed, and can be sued for damages for Petitioner's losses.

The dismissal of Petitioner's appeal by strict enforcement of rule § vscr-5:17 (a) (1) on procedure is unfair to the merits of Petitioner's complaint because the rule is inequitable and requires constant review and discretionary action to make it neutral to all appellants which is not the case with strict enforcement. By failing to use its discretion, ruling on strict procedure is a miscarriage of justice to Petitioner and the merits of the case.

STATEMENT

Petitioner, Ronald D. Morgan, initiated his Complaint for Compensation against the Town of Mineral, Virginia (the "Town") on October 14, 2008 and amended his Complaint on July 12, 2009 in the Circuit Court for the County of Louisa alleging the Town, in consultation with their attorney, acted without authority in the demolishment

of a building owned by Petitioner, located at 70-74 Louisa Avenue in the Town of Mineral located in the County of Louisa, Virginia, by denying him a pre-deprivation due process hearing to contest their allegations and by acting outside the Codes of Virginia and Mineral by not legally declaring Petitioner's property a nuisance before its demolition. In the demolition of Petitioner's property, the Town destroyed and removed property unrelated to the codes cited as authority for their action for which Petitioner was uncompensated or his loss.

The Town of Mineral demurred to Petitioner's original Complaint on December 3, 2008 and the Members of the Town Council Individually demurred to Appellant's Amended Complaint on June 30, 2009 arguing that the Appellant failed to state a claim against the Town of Mineral and the individual members of the Town Council of the Town of Mineral upon which relief can be granted. The trial court sustained the demurrer and ruled, *inter alia*, that the

amended complaint failed to state a claim of substantive due process violation, any negligence claim against the Town of Mineral was barred by Sovereign immunity and that the statutes at issue in this case namely 15.2-906 VA. Code Ann. (1950), 15.2-115 Va. Code Ann (1950) and Mineral Town Code Section 5-4 are constitutional under both the Virginia and Federal Constitutions as they provide for a reasonable notice in advance of actions of removal of property and further provide a *pre-removal opportunity for repair*, all of which, the trial court found, satisfied the requirements of procedural due process under the 14th Amendment of the United States Constitution and Article I, Section II of the Virginia Constitution. (Emphasis added)

Petitioner filed timely Notice of Appeal of the Circuit Court's Order on January 4, 2009, and submitted his Petition for Appeal on March 3, 2010.

In that petition, Petitioner disputes the trial court findings that: (1) the statutory scheme is not constitutional

if it does not provide for a pre-deprivation hearing is inconsistent with procedural due process under the Fourteenth Amendment of the United States Constitution and Article I Section II of the Virginia Constitution; (2) the Town did not act with authority in having the Appellant's property demolished without first having had that property legally determined to be a public nuisance; (3) Appellant failed to state a cause of action for a substantive due process violation; (4) any cause of action based on the negligence of the Town of Mineral is barred by sovereign immunity; and (5) Appellant failed to state a claim for damages.

The Town, in response to Appellant's Petition for Appeal, filed a Motion to Dismiss on March 8, 2010 based on § vscr-5:4, 5:5(a), and 5:17 (a) (1). The Supreme Court of Virginia dismissed Petitioner's appeal on April 30, 2010, "finding that the appeal was not perfected in the manner provided by law because the appellant failed to timely file the petition for appeal, the Court grants the Appellee's

Motion and dismisses the petition filed in the above-styled case (Record No. 100409, Circuit Court No. CL08000293-00). Rule 5:17(a) (1). Rule § 5:17(a)(1) states a time limit of not more than three months after the entry of the order from the trial court (Circuit Court of Louisa County) in a direct appeal from that court.

Petitioner filed a Petition for Rehearing on May 12, 2010 arguing that § vscr-5:17 (a) (1) provides unequal time to all Appellants, is vague on the amount of time due Appellants, fails to consider unique circumstances, and that the Court's dismissal on strict interpretation of procedure by failing to use its discretion in considering the constitution merits of the case is a miscarriage of justice. The Supreme Court of Virginia informed Petitioner on June 18, 2010 that his Petition for Rehearing had been denied.

ARGUMENT

I. Equitable fairness of § vscr-5:17 (a) (1)

The merits of Petitioner's case were dismissed by the Supreme Court of Virginia for failure to submit a timely petition based on § vscr-5:17 (a) (1).

While this rule restricts time to a total of three months, it is sufficiently vague by not making clear how much time within the three months Petitioner is entitled in order to prefect his appeal. Time is inequitably applied to Appellants based on grouping of months, service, holidays and weather, makes no allowances for disasters or unique circumstances which affect tolling time, and is unclear in its instructions that non compliance is fatal to the appeal. As written and strictly interpreted, this rule is inequitable, unjust and fundamentally unfair to *pro se* litigants by the Court's strict interpretation which encourages the Court to dismiss appeals on procedure rather than considering their merits.

If the Virginia Legislature meant for Appellants to enjoy the full statute of limitations of three months, the Court should not decide that a truncated time window is nevertheless a reasonable enough filing period. If the Legislature did not mean for Appellants to enjoy the full period of three months, it has left this legislation vague as to how much time Appellant is entitle to in perfecting his appeal. The question of what is a reasonable reduction in time for service and other unequal factors, including unforeseen circumstances, is left to the Court to determine without the benefit of guidance from the rule which unfairly causes a *pro se* litigants to guess at what is reasonable and what is unreasonable.

1. Rule § vscr-5:17(a)(1) is needlessly vague on time being mandatory.

Rule § vscr-5:17(a)(1), Petition for Appeal, is not clear on the subject of its time limit being mandatory, that it is strictly enforced, that it is procedurally fatal to an appeal, or

that time can be altered at the discretion of the Court. It states:

> (a) Time for Filing. In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the clerk of this Court:
>
> (1) in the case of an appeal direct from a trial court, not more than three months after entry of the order appealed from;

While time is to be "not more than three months," it fails to make clear the consequences after three months. In addition, it does not contain language that is "unusually emphatic" such as "must," nor does it "reiterate" it's time limitation which would support it being interpretive as mandatory and not subject to discretionary modification in the interest of justice.

In contrast, Rule § vscr-5:9 (a), Notice of Appeal is clear in its deadline being mandatory:

> (a) Filing Deadline; Where to File. **No appeal shall be allowed unless** within 30 days after the entry of final judgment or other appealable order or decree, or within any specified extension thereof granted by this Court

> pursuant to Rule 5:5(a), counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel. A notice of appeal filed after the court announces a decision or ruling /- but before the entry of judgment or order /- is treated as filed on the date of and after the entry. (Emphasis added).

If the legislature had intended Rule § vscr-5:17 (a) (1) to be mandatory, it would have used similar language to Rule § vscr-5:9 (a) and would not have given the Supreme Court discretion to extend time in Rule§ vscr-1:9, Discretion of Court:

> All steps and procedures in the clerk's office touching the filing of pleadings and the maturing of suits or actions may be reviewed and corrected by the court.
>
> The time allowed for filing pleadings may be extended by the court in its discretion and such extension may be granted although the time fixed already has expired; but the time fixed for the filing of a motion challenging the venue shall in no case be extended except to the extent permitted by § 8.01-264.

This Court in *Kontrick v. Ryan*, 540 U. S., at 454-455 (2004) has distinguished between time limits on court rules

for claim-processing and time limits on subject-matter jurisdiction.

> "[C]lassify[ing] time prescriptions, even rigid ones, under the heading `subject matter jurisdiction'" can be confounding *Carlisle v. United States*, 517 U. S. at 434 (1996) (GINSBURG, J., concurring). Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." See *Scarborough v. Principi*, 541 U. S. 401, 414 (2004); *Eberhart v. United States*, 546 U. S. 12, 17-18 (2005) *(per curiam)*; *Arbaugh v. Y & H Corp.*, 546 U. S. 500 (2006); *Bowles v. Russell*, No. 06-5306 (2007) (Dissenting Opinion of JUSTICE SOUTER)

Virginia Supreme Court Rule § vscr-5:17 (a) (1) should be considered to be claim-processing, subject to its time being modified by the discretion of the Court for equitable considerations, and not mandatory excluding discretion.

2. Rule § vscr-5:17 (a) (1) provides unequal time to Appellants.

Petitioner should be entitled to an equal amount of time as any other Appellant filing in a different grouping of

three months and receiving notice by mail. The real time Appellant has for filing, however, is not uniformly consistent by measuring time in months which varies in length of time and is affected by weather and holidays unique to certain groupings of months as distinct from others.

a. Time measured in months rather than days.

Because the time of this rule is measured in months instead of days, the number of days in the month gives one to two additional days to groupings of nine of twelve months that do not include February, totaling 91 for two month groupings and 92 days for seven month groupings, while the three groupings of months that include February totals 89 or 90 days, Appellant's grouping being 90 days. Petitioner's brief was filed with the court in 92 days and should be treated equally with those grouping of seven months that include 92 days.

b. Unequal and timely notice.

By including service within the combined time of three months reduces the amount of available time to craft an appeal since notice by mail unequally affects by time depending on when it is mailed and its destination.

In filing Notice of Appeal, Petitioner relied on § vscr-2A:2, Notice of Appeal:

> Any party appealing from a regulation or case decision shall file, within 30 days after adoption of the regulation or after service of the final order in the case decision, with the agency secretary a notice of appeal signed by him or his counsel. In the event that service of a case decision upon a party is accomplished by mail, 3 days shall be added to the 30-day period.

Rule § vscr-1:7 also states that "(w)henever a party is required or permitted under these Rules, or by direction of the court, to do an act within a prescribed time after service of a paper upon counsel of record, three (3) days shall be added to the prescribed time when the paper is served by mail..."

In Contrast, rule § vscr-5:17(a)(1), Petition for Appeal, includes notice within the three month time period but fails to address the issue of what is reasonable time for notice and what is not. In Petitioner's case, the Circuit Court entered their Order on December 1, 2009 but mailed it on December 3, 2009. Petitioner received his notice on the afternoon of December 7, 2009, three days after the time permitted for filing Notice of Appeal which time limit is considered mandatory. If three days for notice by mail is considered reasonable and mandatory for two rules, then six days should be considered unreasonable since by Petitioner receiving the Order in the evening of the 7th, effectively subtracting four days from the total time Petitioner feels he was entitled.

Rule § vscr-5:17 (a) (1) does not address the issue of a reasonable and equitable time period for notice. So long as time begins to toll with the entry of the Order in an open ended three month period, Appellant is dependent on timely

notice by the Court and the efficiency of the Post Office to prevent an unacceptable loss of entitled time on his appeal which inevitably will vary from Appellant to Appellant depending on when the order is mail and if it is to a local or out of town address.

This unequal variation in time of notice is inequitable and unjust in determining the life of an appeal when the rule is strictly enforced and the Court fails to utilize its discretion to make sure that the rule is equally applied to all Appellants.

c. Unequal impact of holidays.

Entitled time is further eroded by groupings of months with major holidays, as in Petitioner's case, where the time before Christmas through the New Year and President's Day limits or restricts Appellant's access to public libraries for the purpose of research.

This lost time is unique to this particular grouping of months, December, January, and February as well as the

grouping of months that includes November, December, and January because of time lost by holidays and weather conditions are not equally shared by other grouping of months absent these factors. This same unique circumstance also occurs in the months of June, July, and August when the public libraries are closed on Sunday due to summer vacation which further restricts time for pro se litigants relying on the public library for its resources including access to the internet. Other Appellants in different groupings of months are not similarly affected by this limitation in time.

3. Rule § vscr-5:17 (a) (1) makes no tolling allowance for extraordinary circumstances.

If one presumes this rule has been crafted by the legislature to factor in normal contingencies including time for service, holidays and weather within a three month period, it fails to address the following: how much of the total time of three months is allocated for known contingencies? How much time of three months is Appellant

reasonably entitled to in order to prepare his appeal? and How much time has been factored, if any, to account for various unforeseen contingencies? Without such knowledge, it is impossible to determine when entitled time is being intruded on by an unforeseen loss of time not factored into the total time of this rule by the legislature and when tolling time should be suspended.

The unique circumstance of the recent back to back record snow storms of 2009-2010, which shut government and libraries down for a combined period of five days and the loss of power during that time, adversely affected Petitioner's ability to access legal information at the public library and the internet. This constitutes an example of extraordinary circumstance beyond Petitioner's control and, as such, an unforeseen loss of time that is unique to Petitioner and his filing group of three months and is not a factor to Appellants filing in a different grouping of months.

In addition to the loss of time due to closure, the amount of real time available to Appellant was significantly reduced by the lingering conditions of piled snow which restricted the number of lanes, street access and limited parking spaces. Public transportation was only marginally better when factoring the increase amount of travel time and walking time to destinations because of sidewalks were not cleared of snow.

Exceptions have been made by the Court when deadlines have collided with the interests of justice. In creating the doctrine of equitable tolling, the Courts have recognized the need to provide for the means to grant additional time to meet a deadline that falls outside the statutory period. Courts recognize that equitable tolling is an exception to the rule and it should therefore be used only in exceptional circumstances. This exception, however, should be used in cases like this where the snow storms of 2009-2010 were unforeseen. Tolling time should be

suspended in such cases to create a neutral rule that does not give one Appellant an advantage in time over another.

4. Rule § vscr-5:17 (a) (1) incorrectly presumes the same time requirement to be equitable for attorneys and *pro se* litigants.

The assumption of this rule is that the legislature has provided for a reasonable amount of time to prefect an appeal by factoring service and other contingencies within the three month period which allows the court to strictly enforce the rule.

While this time may be deemed to be sufficient for attorneys already familiar with the law, with access to online legal sites that facilitate the processing of legal information, and resources of a firm that includes a library, the combined knowledge of the firm and support staff, it does not take into account the needs of the *pro se* litigant that has none of these resources, who requires more time for research, and who has to spend additional time processing the meaning of that research already known to attorneys.

This Petitioner has required all of the time he is entitled to in order to make an effective presentation on appeal and has worked diligently on his petition due to its importance in reviving his case.

With limited or no state and private assistance from non-profits and law firms for civil cases, a fact already known to the Court, the time required by *pro se* litigants is greater than that required by attorneys and their firms. Since the time limit rule for appeal has been crafted by attorneys for attorneys with their needs in mind, this rule unfairly penalizes *pro se* litigants who lack the same knowledge and resources and who requires more time to craft an appeal which inevitably flirts with the time limits of filing.

5. Legislature amended criminal code to address inequity of appeals procedure and its relevance to civil procedure.

Effective July 1, 2005, the Virginia Legislature provided a separate procedure for pursuing a delayed appeal

due to countless criminal appeals which have been dismissed over the years due to attorney error and overly strict filing rules. The new statutes are Va. Code Section 19.2-321.1 (motion for delayed appeal to the Va. Court of Appeals) and Va. Code Section 19.2-321.2 (for the Va. Supreme Court). The two versions are basically the same.

Those same conditions of attorney error and overly strict filing rules exist in civil appeals as well. Even though similar legislation has yet to be enacted for civil appeals, It is fair to say that the Legislature acted as it did in recognition that too often cases were unjustly dismissed on procedure instead of merits which they felt was unfair and that this intent by the legislature should be equally applied to civil cases.

Petitioner believes that his appeal would qualify for reinstatement in the criminal system under the amended codes as written because of the merits of his case and the delinquent filing time did not cause a substantial delay in

time, the purpose of the rule, and the delay in time has not disadvantaged Respondent. For these reasons the Virginia Supreme Court should have used this amendment as an expression of legislative intent to fairly balance the needs of the rule and equity to the merits of the case by applying those standards to reinstating Petitioner's Appeal.

6. Discretion of the Court in unique circumstances.

The Virginia Supreme Court has discretion to reconsider extenuating circumstances in reinstating this case in rule § vscr-5:20 and may exercise its discretionary authority in allowing the reinstatement of Petitioner's Appeal according to § vscr-1:9

The United States Court of Appeals, Tenth Circuit, in *Morales-Fernandez v. I.N.S.*, 418 F.3d 1116 (2005) offers an instructional analysis of plain error standard regarding the contemporaneous-objection rule that is used to employ discretion in which a "miscarriage of justice would otherwise

result" and is relevant to Petitioner's argument for Writ for Certiorari.

This discussion states that plain error standard is synonymous with "interests of justice," "miscarriage of injustice," or "manifest injustice" exceptions and is employed sparingly in those instances. *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Gonzalez-Huerta*, 403 F.3d 727, 73 6 (10th Cir.2005) (*en banc*); *Allan v. Springville City*, 388 F.3d 1331, 1334 n. 2 (10th Cir.2004); *United States v. Kimler*, 335 F.3d 1132, 1141 (10th Cir.2003); and *United States v. Chavez-Marquez*, 66 F.3d 259, 261 (10th Cir.1995); and *United States v. Moore*, 83 F.3d 1231, 1234 (10th Cir.1996).

Among the factors that the Court has considered in determining whether to invoke the exception of plain error is "... a *pro se* litigant's effort to comply, the force and

plausibility of the explanation for his failure to comply, and the importance of the issues raised are all relevant considerations in this regard." *See generally* Id.; *Wirsching v. Colorado*,360 F.3d at 1197-98 (10th Cir.2004); *Theede v. United States Dep't of Labor*, 172 F.3d 1262, 1268 (10th Cir.1999). "If a plain error affects the integrity, fairness, or public reputation of judicial proceedings, it is in the discretion of the reviewing court to correct the error." *Johnson v. United States*, 520 U.S. at 467, 117 S.Ct. 1544 (1997)

Petitioner believes that he has exercised due diligence[1] in his effort to comply with the time limit and that vagueness and inequity of Rule § vscr-5:17 (a) (1), the unique and extraordinary unforeseen circumstances of record back to back snow storms, and the importance of the

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[1] The diligence required for equitable tolling purposes is " 'reasonable diligence,' " see, *e.g.*, *Lonchar*, 517 U. S., at 326, not " ' "maximum feasible diligence," ' " *Starns* v. *Andrews*, 524 F. 3d 612, 618 (CA5 2008) (quoting *Moore* v. *Knight*, 368 F. 3d 936, 940 (CA7 2004)). Holland v. Florida, No. 09-5327 (2010)

constitutional issue of due process and government abuse of authority fulfill the requirement of plain error and the discretionary reinstatement of Petitioner's Appeal.

The Virginia Supreme Court should have taken into consideration whether: (1) the time limit of § vscr-5:17 (a) (1) is equally applied to all Appellants; (2) unforeseen factors that eliminate blocks of time should suspend the tolling of time; (3) this rule equitably serves the needs of *pro se* litigants; and (4) it is equitable, fair and just to dismiss the merits of Petitioner's appeal on a rule with inherent equitable issues because of an innocent and unintentional delinquency of two days by a *pro se* litigant without the benefit of legal assistance from the State or other legal aid organizations.

II. The dismissal of an appeal dealing with important Constitutional issues and State Law on procedure is a miscarriage of justice.

The merits of Petitioner's Appeal involves the denial of his Constitutional right to Due Process by the Town of

Mineral by: (1) their failure to provide Petitioner with a hearing on the merits of their allegations; (2) requiring work to done to Petitioner's property by code and acting in bad faith by failing to inspect that work for compliance; (3) the Unconstitutional vagueness of codes cited as authority by the Town as justification for their actions; (4) the taking of his property without it first being legally declared a nuisance in violation of State law; and (5) the taking of personal property unrelated to the alleged nuisance condition of the building which is uncalled for in the codes cited. For the merits of these important issues to be dismissed on procedure is a miscarriage of justice in denying Petitioner access to compensation for his loss.

1. Petitioner's right to due process

Virginia courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution. *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376

S.E.2d 525 (1989). The Constitution of Virginia, Section 11, and the Fourteenth Amendment of the Constitution of the United States both state that *"That no person shall be deprived of his life, liberty, or property without due process of law."* (Emphasis added) Due process has been established to "minimize substantively unfair or mistaken deprivations" (*Fuentes v. Shevin*) by enabling a person to contest the basis upon which government proposed to deprive him of a protected interests; namely the taking of real and personal property in this case.

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) concludes the following as applying to due process:

a. ...property is an individual entitlement grounded in state law, which cannot be removed except "for cause;" and

b. ...the importance of the private interest and the length or finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interest – leads to the conclusion that appellant is entitled to have the Commission consider the merits of his charge, based upon the substantiality of the

available evidence, before deciding whether to terminate his claim.

c. The availability of a post-termination tort action does not provide appellant due process. It is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

In ¶ 3 of the Court Order sustaining the Respondent's Demurrer, the Circuit Court of Louisa County found that Town Code § 5-4, Virginia Code § 15.2-906, and Virginia Code § 15.2-1115 are constitutional by providing notice and a pre-removal opportunity to correct violations despite the fact that these codes do not provide for a pre-deprivation hearing, an indispensible aspect of due process, and no Court has ruled that the opportunity to abate an alleged violation can be viewed as a substitute for a hearing. It is the duty of a municipality to provide for the opportunity to contest the basis of their allegation under due process by a hearing in a neutral setting. The right to be heard is not a

privilege but a right that is not a discretionary act of government. *Roller V. Holy*, 176 U.S. 398, 409 (1900) and *Louis & Nash R. Co. v. Stock Yards Co.*, 212 U.S.132, 144 (1909)

The foundation of due process is notice and a hearing before an impartial tribunal and these fundamental requirements can be summarized as follows in the findings of this Court as stated: "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest." *Mathews v. Eldridge*, 424 U.S. 319, 333, 343–45 (1976). "Parties whose rights are to be affected are entitled to be heard." 273, *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863). Due process must give an individual "an opportunity to be heard respecting the justice of the judgment sought." *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884) and that "It follows that any legal proceeding enforced by public authority... must be held to be

due process of law." *Hurtado v. California*, 110 U.S. 516, 537 (1884).

"The constitutional right to be heard is a basic aspect of the *duty of government* to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment. . . ." *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972) (Emphasis added). See *Joint Anti–Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170–71 (1951). "Where the loss, even temporarily, would be severe or catastrophic, the hearing must come first..." *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

2. Property was not legally determined to be a nuisance by the court prior to its removal.

The Circuit Court in ¶ 3 of the Court order found that the Town acted with authority by substituting their

Resolution for that of the Court in declaring Petitioner's property to be a nuisance. While the power to abate nuisances to protect the general welfare may include the power to destroy or order the destruction of private property, a government is without authority to destroy private property as constituting a public nuisance, unless it has been lawfully determined that the property does, in fact constitute a public nuisance.[2] "...every individual's property subject to power of destruction by public authorities if it becomes nuisance, but power to destroy depends on property being, in fact and law, a nuisance."[3] The Virginia Supreme Court has held that "...it is the duty of the courts to determine whether a public nuisance exists..." *Stickley v. Givens*, 179 Va. 548, 11 S.E.2d 631 (1940).

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[2] 13 AM. JUR. 2D Buildings § 41 (1964 & Supp. 1992).
[3] Constitutional Rights of Owner as Against Destruction of Building by Public Authorities, J.E. Macy, annotation 14 A.L.R.2D 73 (1950).

The Town's allegations of nuisance conditions in their letter(s) of complaint and their Resolution were unsubstantiated in fact by the Court. "As was held in *Yates v. Milwaukee*, 77 U.S. 497, 498 (1970), the mere declaration by a city council that a certain structure was an encroachment or obstruction, did not make it so, 'nor could such declaration make it a nuisance unless it in fact had that character.'" *White v. Town of Culpeper*, 172 Va. 630, S.E. 2d 269 (1939). Since the health or safety claim against Petitioner's property was never established in fact by the Court, the exercise of police power by the Town of Mineral was unwarranted. "Unless the general public is affected, there is no warrant in law for the exercise of the police power." *White v. Town of Culpeper*, 172 Va. 630, S.E. 2d 269 (1939).

By failing to declare Petitioner's property nuisance in fact, the Town acted without authority in implementing the demolition of his property under codes cited by the Town

without the benefit of due process. "Where an alleged nuisance is not a nuisance *per se*, the burden of proof is upon the plaintiff to show that it is a nuisance in fact." *Daniel v. Kosh*, 173 Va. 352, 4 S.E. 2d 381 (1939).

In *Roanoke v. Bolling*, 101 Va. 182, 43 S.E. 343 (1903), the Supreme Court of Virginia held that the city was without authority to declare a building to be a nuisance and to order its destruction unless the building was, in fact, a public nuisance. The Court further held that the legislature could not confer on a municipality the authority to declare property a nuisance or to destroy property until the property had been legally determined based on the facts, to be a public nuisance. (101 Va. At 186-87, 43 S.E. at 344)

> "The power to abate nuisances does not warrant the destruction of valuable property which was lawfully erected; or anything which was erected by lawful authority. It would be indeed a dangerous power to repose in municipal corporations to permit them to declare by ordinance or otherwise anything a nuisance which the caprice or interest of those having control of its government might see fit to outlaw, without being responsible for all consequences; and even if such power is expressly given by the

legislature, it is utterly inoperative and void unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and is in defiance of the law. Wood on Nuisances, 832. See also *Yates v. Milwaukee*, 77 U.S. 497, 19 L. Ed. 984, *Mt. Vernon Bk. v. Sarlis* (Ind. Sup.), 28 N. E. 434, 28 Am. St. 185, 13 L. R. A. 481; Tiedeman on Munic. Corps. Sec. 130." *Roanoke v. Bolling*, 101 Va. 182, 43 S.E. 343 (1903).

3. Substantive Due Process and the Constitutionality of Virginia Codes §15.2-906, §15.2-1115 and Town of Mineral Code§ 5.4

The Circuit Court of Louisa County in ¶ 5 of the Court Order found that Petitioner has failed to make a substantive due process claim. Petitioner's substantive due process claim involves a protected property interest under the Fourteenth Amendment of the Constitution of the United States and the Virginia Constitution, Section 11 which states that no person shall be deprived of *"life, liberty, or property without due process."* The codes implemented by the Town failed to provide for a pre-deprivation hearing and are unconstitutionally vague because their authority is

interpreted as independent from the Court and other Virginia Codes which provide for dues process.

If substantive due process tests the reasonableness of a statute, the codes cited do not pass the "reasonability" test if an otherwise reasonable relation to a proper purpose is arbitrarily and subjectively enforced and misinterpreted due to the language of these codes. If the "proper purpose" of these codes is to be used in conjunction with other codes, or a determination by the Court, which provide for due process, they fail this test by not making that connection. By the codes cited being interpreted independent from sources of due process, and without the fundamental requirement of a due process hearing written into the codes, they deny constitutionally protected right of property to a pre-deprivation hearing and are therefore, unconstitutional as interpreted.

Even if these codes are connected to the due process afforded by Title 48, or other code(s), they are

unconstitutionally vague if the Town and their attorney can interpret these codes as giving them authority to act on abatement independent of procedural due process which violates substantive due process.[4]

Substantive due process also requires that the individual hearing cannot be circumvented through evidence which contains "irrebuttable presumptions," as was the case with the Town's allegations in their Resolution, which the Town would otherwise have to prove as the basis for its action. In *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989), the Court held:

> "...if a government presumes facts that leave no room for rebuttal and uses that presumption to deny a person a constitutional right, due process will be violated. If the right or status affected by the irrebuttable presumption is constitutionally protected, the presumed facts must be 'necessarily or universally true.'" *Vlandis v. Kline*, 412 U.S. 441, 452 (1973).

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[4] ...if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissible delegates basis policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

Irrebuttable presumptions can be sustained only where the facts presumed are "necessarily and universally true" and alternative means of proof are unavailable. Administrative convenience does not dispense with a person's due process right to be heard with respect to that which is presumed. *(Stanley V. Illinois*, 450 U.S. 645, (1972). The Court speaks to the standard of proof as being "clear, unequivocal and convincing." *Addington v. Texas*, 441 U.S. 418, 423, 424 (1979).

Since municipalities rely on the State Codes for their local codes, it is the responsibility of the State to have clearly written into the Codes cited procedures for enforcement by which due process is observed in violation of substantive due process. Due process is more than just giving notice of an impending action based on unsubstantiated allegations.

4. The Town is not entitled to sovereign immunity.

The Circuit Court of Louisa County ¶ 6 of the Court Order found that the acts of Respondents were in "performance of governmental function and, therefore, any negligence claim related to that conduct is barred by sovereign immunity."

Virginia Code §15.2-1102, General grant of power; enumeration of powers not exclusive; limitations on exercise of power, states that a municipality may exercise all powers not expressly prohibited by the Constitution and general laws of the Commonwealth. Authority is not granted by the state for a municipality to declare a nuisance in fact or to deny procedural due process before the taking of property.

In Civil Rights Act, *42 USC § 1983*, the Court held a person acting under the color of any statute such as codes cited and causes the deprivation of any rights, as due process in this case, shall be liable in a suit in equity. This Court held in *Monell v. Department of Social Services*, 436

U.S. 658 (1978), that local governments can be sued directly under *§ 1983* were action is alleged to be unconstitutional.

In *Owen v. City of Independence*, 445 U.S. 622, 623, 624 (1980), this Court held:

> "...a municipality has no immunity from liability under § 1983 flowing from its constitutional violation, and may not assert the good faith of its officers as a defense to such liability."

The Town, in collaboration with their attorney, has collectively acted in bad faith by failing: (1) to declare Petitioner's property a nuisance by law; (2) to properly implement the Town and State Codes; (3) to exercise their ministerial duty of inspecting work required by code which altered the condition of Petitioner's property; (4) to act on facts rather than presumptions that the property was not in compliance; (5) to provide Petitioner's with a pre-deprivation hearing as a part of due process under State and Federal Constitutions; (6) to include "secure or repair" as means of compliance with the codes instead of "remove;" (7) to exercise their ministerial duty of inspecting Petitioner's

work after requiring him to support the exterior walls of his building; (8) to exercise their ministerial duty to adequately supervise the demolition of Petitioner's building causing additional work to be done unrelated to the abatement of the alleged nuisance and billing Petitioner for its cost; (9) to exercise their ministerial duty to prevent the destruction and removal of personal property unrelated to their unauthorized demolition of Petitioner's building; and (10) to provide Petitioner with a hearing to contest their claim before attaching a lien to Petitioner's property and attaching his checking account. "Immunity is not available when an officer or employee acts in bad faith." *Harlow v. Clatterbuck* 230 Va. 490, 494, 339 S.E. 2d 181 (1986).

5. Failure to state a claim.

The Circuit Court of Louisa County ¶ 7 of the Court Order found that Petitioner failed to state a claim having dismissed Petitioner's due process claim.

Petitioner stated in ¶ 31 of his Amended Complaint that Defendants removed personal property and performed work unrelated to their nuisance claim.

> Defendants went beyond the authorization of the code to destroy and remove Plaintiff's personal property known to the Town Manager as separate from debris both inside and outside the Auditorium Building; destroyed Plaintiff's fence between the Auditorium and the utility and school buildings; engage in additional work not required by code in removing an old foundation and sections of the side walk between the auditorium and the school building; the unrelated trimming of Plaintiff's pine tree which had more to do with beautification than with health and safety issues; and billed Plaintiff for that unwarranted and extra work.

Plaintiff further stated in ¶ 38 of his Amended Complaint that Defendants "have failed to adequately supervise the demolition of the Auditorium causing Plaintiff the loss of property, and have willfully billed Plaintiff for work not authorized by code" and asked the Court to be compensated for his losses.

These losses and expenses are separate from the demolition of Petitioner's building, which was the subject of

his denial of due process and the Town acting without authority, and these losses and expenses remain uncompensated due to the Town's ministerial negligence.

CONCLUSION

This Court should grant Petitioner's Writ for Certiorari because the untimely filing of this appeal by the Petitioner of two days was due to the lack of clarity and inconsistencies in rule § vscr 5:17 (a) (1) regarding the amount of time to which an Appellant is entitled and the fact that the rule as stated does not treat all Appellants equally. In addition, the Virginia Supreme Court failed to exercise its discretion to modify their time limit despite extenuating circumstance of the unique, unforeseen, and uncontrollable caused by the back to back record snow storms which reduced Petitioner's time for compliance, and that the minimal delay of two days caused by this unforeseen circumstance did not adversely affect Respondent or the timely prosecution of Petitioner's Appeal.

The Virginia Supreme Court has unfairly seen fit to rigidly enforce the time of three months and dismiss Petitioner's Appeal as procedurally untimely while it overlooks the structure flaw of the rule that allows for untimely notice and ignores unforeseen circumstances that unreasonably reduce the time authorized by the legislature to perfect an appeal by failing to use its discretion to neutralize this loss of time.

Petitioner believes that some if not all of that time should have been suspended from tolling since not all Appellants filing in other groups of months were equally affected by a similar loss of time. The Virginia Supreme Court should have exercised its discretion in reinstating his Petition for Appeal.

The ruling of the Circuit Court of Louisa County, Virginia, in dismissing Petitioner's Complaint on Demurrer, has ignored the precedent of this Court and others in protecting the individual's constitution right to a due process

evidentiary hearing before the taking of property as guaranteed under the Fourteenth Amendment of the United States. In excusing the Town for exercising its police power outside the authority of law, the Court is complicit in denying Petitioner due process by ignoring the precedents of this and other courts.

The Virginia Supreme Court, in its procedural ruling, along with the Circuit Court, has effectively sustained and vindicated the illegal use of police power of a municipality, in violation of the Commonwealth's own Constitution and other laws, by determining that the strict interpretation and enforcement of its procedural rule § vscr-5:17 (a) (1) is more important to the ends of justice than the merits of the case involving due process which Petitioner believes is a gross miscarriage of justice.

Petitioner is requesting that this honorable court grant Certiorari Review of this case and rule on the merits of this case.

APPENDIX

EXHIBIT A; CIRCUIT COURT ORDER

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF LOUISA

RONALD D. MORGAN,

Plaintiff, Case No.: **CL08000293-00**

v.

TOWN OF MINERAL,
EDWIN KELLER, MAYOR, TOWN COUNCIL,
PAM HARLOWE, VICE-MAYOR, TOWN COUNCIL,
BROOKS BESLEY, TOWN COUNCIL,
BERNICE WILSON KUBE, TOWN COUNCIL,
ROY PAYNE, TOWN COUNCIL,
ROY MCGEHEE, TOWN COUNCIL,
WILLIAM THOMAS, TOWN COUNCIL,
GEORGE REEVES, TOWN COUNCIL,
JAMES DODD, TOWN COUNCIL,
WILLIE HARPER, TOWN MANAGER,

Defendants.

ORDER

This case came on this 12th day of November, 2009 for a hearing on Defendants' Demurrers to the Amended Complaint served on them. Upon mature consideration of the arguments by counsel for the Town of Mineral and the individual defendants as well as by the plaintiff, the Court, after mature consideration of the Amended Complaint and arguments by counsel for Defendants and Ronald D.

Morgan, *pro se*, ruled, for the reasons stated of record in the transcript of the hearing which is incorporated herein, as follows:

1. The Court find that §8.01-243 (A), Va. Code Ann. (1950) as amended, is the applicable statute of limitations governing claims filed pursuant to 42 U.S.C. §1983 and finds that all claims against the individual defendants alleged in the Amended Complaint are barred by the statute of limitations.
2. The Court finds that any claims in the Amended Complaint for punitive damages against the Town of Mineral fail because Defendant admitted to only be seeking punitive damages for the time barred claims against the named individual defendants and moreover, because punitive damages are unavailable in any claim against a municipality filed pursuant to 42 U.S.C. §1983.
3. The Court find that §15.2-906, Va. Code Ann. (1950) as amended, §15.2-1115, Va. Code Ann. (1950) as amended, and Mineral Town Code Section 5-4 are constitutional under both the federal and Virginia constitutions. The statutes and code section provide for reasonable notice in advance of actions of removal and, further, provide a pre-removal opportunity for repair, all of which the Court finds satisfies the requirements of procedural due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the Virginia Constitution.

4. With respect to allegations of selective enforcement by the Town, the Court finds that the Amended Complaint fails to allege a suspect classification for such an equal protection claim and that the Town of Mineral's actions in the demolition of the auditorium at issue in this case were supported by a rational basis. Accordingly, the Court sustains the Demurrer finding no violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution is stated in the Amended Complaint.
5. The Court finds that the Amended Complaint fails to state a claim of a substantive due process violation for the reasons set forth in Defendants' opening and reply briefs.
6. To the extent the Amended Complaint alleges any negligence in the administration of the state statutes and the Town Code, the Court finds that the conduct alleged against the individual defendants and the Town in the Amended Complaint was performance of a governmental function and, therefore, any negligence claim related to that conduct is barred by sovereign immunity.
7. Based on the Court's reading of the Amended Complaint and the Plaintiff's representation that all other claims in the Amended Complaint were based on his allegation of a due process violation of the Fourteenth Amendment to the United States Constitution, the Court finds that any remaining

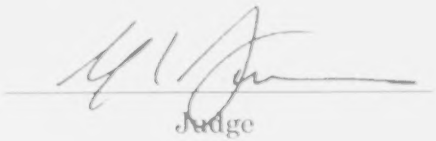
factual allegations in the Amended Complaint fail to state a claim for relief. WHEREFORE, the Court hereby GRANTS Defendants' Demurrers to all claims in the Amended Complaint and ORDERS the case dismissed with prejudice.

Amended Complaint and ORDERS the case dismissed with prejudice.

For reasons stated in open Court with counsel for Defendants and Plaintiff, himself, present, endorsement of this Order is dispensed with.

It is further ORDERED that the clerk forward copies of this Order to all counsel for the Town of Mineral and to Plaintiff.

Entered this 1st day of December, 2009.



Judge

EXIBIT B: NOTICE OF APPEAL

NOTICE OF APPEAL FROM TRIAL COURT (Rule 5:9) VIRGINIA: IN THE CIRCUIT COURT OF LOUISA COUNTY NOTICE OF APPEAL

In the case of RONALD D. MORGAN, Plaintiff v. TOWN OF MINERAL ET AL, Defendant, Case. No.: CL08000293-00, Plaintiff hereby appeals to the Supreme Court of Virginia from the Circuit Court of Louisa County its judgment in dismissing Plaintiff's case by Defendant's Demurrer entered on December 1, 2009.

A transcript, brief and related facts to this case will be filed.

CERTIFICATE

The undersigned certifies as follows:

The name and address of appellant is: RONALD D. MORGAN, 6509 Rockhurst Road, Bethesda, Maryland, 20817.

The appellant is not represented by counsel. His address is listed above and his telephone number is 240-246-4070.

The name and address of appellee is: TOWN OF MINERAL ET AL, 102 East First Street, P.O. Box 316, Mineral, Virginia 23117.

The name and address and telephone number of counsel for appellee is: Richard H. Milnor, ZUNKA, MILNOR, CARTER & INIGO, LTD., Attorneys at Law, 414 Park Street, P.O. Box 1567, Charlottesville, VA, 22902. Telephone number: 434-977-0191.

Appellant certifies that a copy of the transcript has been ordered from the court reporter who reported the case as required by Rule 5:9(b).

A copy of the Notice of Appeal has been mailed to opposing counsel and a copy has been hand delivered to the Clerk of the Court of Appeals on this 4th day of Jaauary, 2010.

_____

Ronald D. Morgan

EXHIBIT C: DISMISSAL OF APPEAL

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 30th day of April, 2010.

Ronald D. Morgan, Appellant,

against Record No. 100409
Circuit Court No. CL08000293-00

Town of Mineral, Appelle.

From the Circuit Court of Louisa County

Finding that the appeal was not perfected in the manner provided by law because the appellant failed to timely file the petition for appeal, the Court grants the appellee's motion and dismisses the petition filed in the above-styled case. Rule 5:17 (a) (1).

A Copy,

Teste:
Patricia L. Harrington, Clerk

By: _____
Deputy Clerk

EXHIBIT D: DENIAL OF REHEARING

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 18th day of June, 2010.

Ronald D. Morgan, Appellant,
against Record No. 100409
Circuit Court No. CL08000293-00
Town of Mineral, Appellee.

Upon a Petition for Rehearing

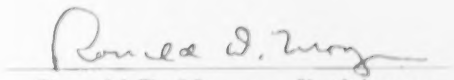
On consideration of the petition of the appellant to set aside the judgment rendered herein on the 30th day of April, 2010 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
Patricia L. Harrington, Clerk

By: *original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court*

Deputy Clerk

Dated: September 16, 2010



Ronald D. Morgan, Petitioner
6509 Rockhurst Road
Bethesda, Maryland 20817
Phone: 240 246-4070

CERTIFICATE PURSUANT TO RULE 5:17(c)

1. The name of the Petitioner is Ronald Morgan.

Petitioner is appearing *pro se*:

Ronald Morgan
6509 Rockhurst Road
Bethesda, Maryland 20817
Phone: 240 246-4070

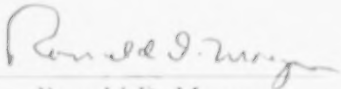
2. The name of Respondent is the Town of Mineral.

Counsel for Respondent is as follows:

Richard H. Milnor, Esq.
Zunka, Milnor, Carter & Inigo, LTD
414 Park Street
P.O. Box 1567
Charlottesville, VA 22902

3. Petitioner certifies that 40 copies of the foregoing Petition for Writ of Certiorari were mailed to the Clerk of the United States Supreme Court by U.S. Postal Express Mail, postage prepaid, in compliance with rules 29 (2) and 33 (1) (f), and three copies of the foregoing Petition in compliance with rule 29 (2),(3) and one copy in compliance with rule 29 (2),(4) (c) were mailed by U.S. Postal Priority Mail, postage prepaid, this 16th day of September, 2010, to opposing counsel, and to the Attorney General of the Commonwealth of Virginia.

4. Petitioner wishes to state orally to a panel of this Court the reasons why this petition for appeal should be granted, and to do so in person.



Ronald D. Morgan

Supreme Court, U.S.
FILED
JAN 7 - 2011
OFFICE OF THE CLERK

No. 10-524

In The
Supreme Court of the United States

RONALD D. MORGAN,
Petitioner,

v.

TOWN OF MINERAL VIRGINIA
Respondents.

On Writ Of Certiorari To The
Supreme Court of the United States

PETITION FOR REHEARING

Ronald D. Morgan, *Pro Se*
6509 Rockhurst Road
Bethesda, Maryland 20817
(240) 246-4070

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No. 10-524

In The
Supreme Court of the United States

RONALD D. MORGAN,
Petitioner,

v.

TOWN OF MINERAL VIRGINIA
Respondents,

On Writ Of Certiorari To The Supreme Court of the United States

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, petitioner Ronald D. Morgan respectfully petitions the Court for rehearing of its judgment and decision issued on December 23, 2010.

INTRODUCTION

The grounds for the Petition of Rehearing of Writ of Certiorari is that: (1) the Supreme Court of Virginia should have used their discretion in applying the Plain Error Standard in reinstating Petitioner's Appeal; (2) the decision of the trial court was not based on facts but on allegations and assumptions presented by Respondent as facts; (3) the ruling conflicts with the decisions of this Court and the Commonwealth of Virginia on the important Constitutional right of Due Process in the taking of property without compensation and the nuisance law of Virginia; and (5) the use of police power by

Responded was without authority under Virginia law.

By sustaining Respondent's Demurrer, the Court upheld his attempt to invoke legal principles that protect the Town's misconduct against legal liability despite the fact that immunity is waived for just compensation in the taking of property by the Fifth Amendment of the United States Constitution and in Article 1, Section 11 of the Virginia Constitution. In doing so, the Court has dismissed Petitioner's right to just compensation for the taking of property, has sustained the Respondent's violation of his constitutional rights, and has compromised Petitioner's right to legal recourse due to statute of limitations.

Rehearing is warranted in the interest of justice to sustain the principle that the rule of law must be based on facts and that constitutional rights

of due process and just compensation for the taking of property cannot be dismissed by Demurrer without factual evidence which is best served in a trail format with the right to question witnesses. The resolution of these unaddressed issues is important to the future lawful practice of this municipality and other local governments.

ARGUMENT

I. PLAIN ERROR STANDARD AND CLAIM PROCESSING

Among the factors that the Court has considered in determining whether to invoke the exception of plain error is "... a *pro se* litigant's effort to comply, the force and plausibility of the explanation for his failure to comply, and the importance of the issues raised are all relevant considerations in this regard." *See generally* Id.; *Wirsching v. Colorado*,360 F.3d at 1197-98 (10th Cir.2004); *Theede v. United States Dep't of Labor,*

172 F.3d 1262, 1268 (10th Cir.1999). "If a plain error affects the integrity, fairness, or public reputation of judicial proceedings, it is in the discretion of the reviewing court to correct the error." *Johnson v. United States,* 520 U.S. at 467, 117 S.Ct. 1544 (1997)

Petitioner believes that he has exercised due diligence[1] in his effort to comply with the time limit and that vagueness and inequity of Rule § vscr-5:17 (a) (1), the unique and extraordinary unforeseen circumstances of record back to back record snow storms, and the importance of the constitutional issues of due process, the taking of property without compensation, and government abuse of authority fulfill the requirement of plain error and standards

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[1] The diligence required for equitable tolling purposes is " 'reasonable diligence,' " see, *e.g., Lonchar,* 517 U. S., at 326, not " ' "maximum feasible diligence," ' " *Starns* v. *Andrews,* 524 F. 3d 612, 618 (CA5 2008) (quoting *Moore* v. *Knight,* 368 F. 3d 936, 940 (CA7 2004)). Holland v. Florida, No. 09-5327 (2010)

outlined by The United States Court of Appeals, Tenth Circuit, which would permit the discretionary reinstatement of Petitioner's Appeal.

This Court in *Kontrick v. Ryan*, 540 U. S., at 454-455 (2004) has distinguished between time limits on court rules for claim-processing and time limits on subject-matter jurisdiction.

> "[C]lassify[ing] time prescriptions, even rigid ones, under the heading subject matter jurisdiction'" can be confounding *Carlisle v. United States*, 517 U. S. at 434 (1996) (GINSBURG, J., concurring). Clarity would be facilitated if courts and litigants used the label" jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." See *Scarborough v. Principi*, 541 U. S. 401, 414 (2004); *Eberhart v. United States*, 546 U. S. 12, 17-18 (2005) *(per curiam)*; *Arbaugh v. Y & H Corp.*, 546 U. S. 500 (2006); *Bowles v. Russell*, No. 06-5306 (2007) (JUSTICE SOUTER et al Dissenting Opinion)

Virginia Supreme Court rule § vscr-5:17 (a) (1) should be considered to be claim-processing subject

to its time being modified by the discretion of the Court for equitable considerations and not mandatorily excluding discretion.

II. RESPONDENT'S ALLEGATION OF NUISANCE CONDITIONS IS NOT SUPPORTED BY FACT

Authority for Respondent's use of police power of government flows from the Commonwealth of Virginia.[2] The use of police power is restricted to certain situations involving health and safety. Along with this power come qualifiers that state when and how that power can be used.

Respondent cites a number of cases to justify the use of police power, and in given circumstances, how the liability for the use of police power is

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[2] Virginia Code § 15.2-1102. General grant of power; enumeration of powers not exclusive; limitations on exercise of power. Authorizes power "which is not expressly prohibited by the Constitution and the general laws of the Commonwealth..."

protected by sovereign immunity. This case is not one.

Codes cited by Respondent facilitate the abatement of nuisance but the authority to declare a nuisance in fact lies with the court under Title 48 – Nuisances of the Virginia Code. The State of Virginia does not confer that power on municipalities except in cases of imminent danger to the public of which this case was not one.

Before implementing the codes cited, the legal need for the use of police power must be established. The Commonwealth of Virginia has structured a procedural process consistent with due process requirements, by which nuisance conditions can be established in fact in Virginia Code, Title 48 – Nuisances. This code provides for an evidentiary hearing consistent with the Fifth and Fourteenth Amendments of the United States Constitution and

Article 1, Section 11 of the Virginia Constitution which prevents the taking of property without due process which this Court has determined requires an evidentiary hearing to establish nuisance in fact. It is not enough for Respondent to allege nuisance conditions; those conditions must be established in fact.

Without establishing a factual basis for nuisance, removal of property by Virginia law is unauthorized except in cases of imminent danger which was not the case with Petitioner's building.

Virginia code § 15.2-906, § 15.2-1115 and Mineral Town Ordinance § 5.4 give the Town authority to abate nuisance conditions caused by buildings. The language of Mineral Town Ordinance § 5.4 is essentially the same as Virginia code § 15.2-906 which states:

> 1. The owner of property therein, shall at such time or times as the governing body may

> prescribe, remove, repair **or** secure any building, wall, or any other structure that **might** endanger the public health or safety of other resident of such locality;
>
> 2. The locality through its own agents or employees may remove, repair or secure any building, wall or any other structure that might endanger the public health or safety of other residents of such locality, **if** the owner and lien holder of such property, after reasonable notice and a reasonable time to do so, **has failed** to remove, repair, or secure the building, wall or other structure. (Emphasis added)

The term "might" in both codes cited triggers the need for evidence to determine these conditions exist in fact. Once that need has been established, three options are given for compliance: "remove, secure **or** repair" depending on the condition of the building.

Virginia Code § 15.2-1115. Abatement or removal of nuisances states:

> A. "A municipal corporation may compel the abatement or removal of all **nuisances**..." (Emphasis added) "...**If** after such reasonable notice as the municipal corporation may

> prescribe **the owner** or owners, occupant or occupants of the property or premises affected by the provisions of this section **shall fail to abate or obviate the condition or nuisance**, the municipal corporation may do so..." (Emphasis added)

The trigger for the municipality to intercede is "if" the owner "has failed" to abate or obviate the health and safety requirements of the codes cited. Once these codes are invoked, the municipality has the ministerial obligation to inspect work done, to comply with the requirements of the codes cited, to determine if work required by code has abated or obviate unsafe conditions of the property and, if not, require additional work to satisfy any remaining concerns.

Compliance can only be determined by a qualified inspector and becomes a ministerial function of government to perform by requiring work to comply with codes. By failing to inspect the work performed by Petitioner, which significantly altered

the building,[3] Respondent had no factual basis for determining the condition of Petitioner's property and the assumption that the work was incomplete and insufficient and was not a justification for the use of police power to remove Petitioner's property. Respondent's argument based on the assumption of nuisance as sustained by the trial court is unjustified.

By implementing the codes cited, Respondent acted without authority since no nuisance was declared by the court and since authority for the removal of property cited in these codes is based on the abatement of "nuisance" conditions. Since no nuisance was declared in fact by the court, since Petitioner did work to abate alleged nuisance

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[3] Petitioner's work included but not limited to the removal of the roof, ceiling, most of the interior walls, a third of the floor area, and work done to support the exterior walls were never acknowledged by the Respondent or considered by the trial court.

conditions, and since the Town failed to inspect the property following Petitioner's work, the Town had no basis in fact to proceed with the taking of Petitioner's property and is liable for that taking.

Despite this lack of authority, the trial court sustained Respondent's action which is a miscarriage of justice.

III. TOWN'S DECLARATION OF NUISANCE DID NOT JUSTIFY THE TAKING OF PROPERTY

The factual basis requiring implementation of these codes was based solely on the unnamed authority of their structural engineer whose report was never introduced as evidence nor did Petitioner have an opportunity to view or challenge the contents of that report prior to the demolition of his building. Because Respondent's expert was not named or identified, there is no way to tell if the person is actually an expert. Unless the person is

identified and has his expertise established, there is no reason for the trial court to have accepted the claim base on his report since that report was never introduced into evidence.

Respondent's structural engineer's report was based entirely on exterior observations because Petitioner's building was lock, windows boarded, enclosed by an eight foot fence. Any interior observations were based on supposition because he made no interior observations of the building, nor did he request access to the interior, and Respondent and the trial court accepted these unsubstantiated observations as fact without establishing the credibility of the report. Any comment made by their structural engineer concerning the building not based on direct observation is speculation and is not credible evidence to justify the removal of property.

By failing in their ministerial duty of inspection, the Town was factually unaware of the condition of the building when they crafted their Resolution, adopted July 10, 2006 which was not base on a factual representation of the building at that time. Respondent incorrectly mentioned "inspections" when the only inspection took place on December 20, 2005; relied on the report as fact; and speculated on building's further deterioration, unsubstantiated by fact, in order to commence with the demolition process. (Exhibit A)

Respondent exceeded their authority in declaring Petitioner's property a nuisance without facts by substituting their Resolution for the jurisdiction of the Court and initiated abatement proceedings before the property was declared a nuisance in fact, violating Virginia Code Section 48-Nuisances, and the Fifth and Fourteenth

Amendments of the United States Constitution and Section 11.1 of the Virginia Constitution which requires a due process evidentiary hearing before the taking of property.

IV. DISMISSAL OF PETITIONER'S COMPLAINT BY DEMURRER IN UNWARRENTED

A question of fact is a factual dispute between litigants that must be resolved by the jury at trial. It is an issue that is material to the outcome of the case and requires an interpretation of conflicting views on the factual circumstances surrounding the case. The law must ensure certain guidelines are set out in order to ensure that evidence presented to the court can be regarded as trustworthy. Respondent's allegations as statements of fact are not trustworthy. For the trial court to sustain Respondent's allegations as fact is a miscarriage of justice.

In *Chappell v. McKune*, 132 F 3d 42, the Court stated that "dismissal of a *pro se* complaint is proper only where it is obvious that plaintiff cannot prevail on the facts he has alleged and it would be futile to allow him an opportunity to amend. See *Whitney v. New Mexico*, 113 F.3d 1170, 1173 (10th Cir.1997). Further, we liberally construe a pro se plaintiff's pleadings. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)" and in *Bonilla v Hurley*, 370 F 3d 494, that ...failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Petitioner ability to challenge Respondent's allegations were inhibited and/or curtailed by the format of the hearing of the Demurrer, with questions orchestrated by the trial court, which gave deference to Respondent in sustaining his

allegations as fact. In sustaining Respondent's Demurrer with prejudice and by dismissing the facts presented by Petitioner in his Complaint, the trial court has unfairly dismissed the merits of Petitioner's case by stating in effect that his Complaint could never be supported by law which is factually untrue.

V. PETITIONER WAS ENTITLED TO DUE PROCESS

Without first having had the property declared a public nuisance in fact before its demolition, as is required under Title 48 – Nuisances, Petitioner was denied an opportunity to confront the Town's allegations of nuisance as required under due process clause of the Fifth and Fourteenth Amendments of the United States and Section 11.1 of the Virginia Constitution.

Respondent alleges that dire conditions justified the removal of property without a hearing.

He quotes in his response to Petitioner's Appeal to the Virginia Supreme Court the following:

> "As the trial court noted in its ruling, the transcript of which is incorporated into the Final Order, (Appendix Exhibit D) when public safety is a issue, liberty or property interests can be deprived even without a prior hearing. Under the circumstances in dealing with a danger to the public, a locality can take action in advance of any hearing. As the trial court noted, any structure that might endanger the public health or safety or other `residents certainly sounds like a nuisance. `The statutory procedure order which the Town of Mineral proceeded satisfied the due process 'fairness' standard under McManama v. Plunk, 250 Va. 27, 34 (1995)."
>
> Finally, as the trial court noted, the statues at issue which provide for abatement of public nuisance are clearly within the legislature's police power. Commonwealth v. Croation Books, 228 Va. 383 (1984)."

Respondent's argument, sustained by the trial court, is the allegation that there was an imminent danger of harm to the community that required Respondent to take immediate action to remove the building in order to protect the public, precluding a

pre-deprivation hearing, is without merit.

Respondent offers no evidence to substantiate his claim, failed to inspect the property before crafting his Resolution on July 10, over seven months after their structural engineer's site visit; misrepresented the condition of the building which was significantly altered by Petitioner; and waited another three months before initiating the removal of the building. It strains credibility to think that an imminent danger existed during this time which could have been eliminated in one week by going to the court for emergency relief.

That the trial court would state "... any structure that might endanger the public health or safety or other residents certainly sounds like a nuisance" shows a bias in favor Respondent. That he would accept as fact unsubstantiated allegations and equate the language of codes as representative

of the condition of the building without proof reflects his predisposition to favor Respondents argument based on allegations, presumption, assumptions, supposition, and inaccurate statements couched as evidence but unsubstantiated by fact.

VI. PETITIONER IS ENTITLED TO JUST COMPENSATION FOR THE TAKING OF PROPERTY

Petitioner's Complaint for Compensation, has argued for compensation for property taken by the Town in its unauthorized demolition of Petitioner's Auditorium Building, the removal of personal property within and outside that building, and the performance of additional work unrelated to abatement action involving alleged health and safety issues

While sovereign immunity is often available to protect a government agency from suit or liability, federal and state constitutions provide a waiver of

immunity where there is a "taking" of property, "damage" to property, or both.

The Fifth Amendment of the United States Constitution provides for just compensation as stated:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.** (Emphasis added)

The Virginia Constitution, Article 1, Section 11 also provides for just compensation:

> That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, **nor any law whereby private property shall be taken or damaged for public**

> **uses, without just compensation**....
> (Emphasis added)

Neither Constitution qualifies the right to just compensation based on sovereign immunity and does not support Respondent's argument in his Demurrer that he was not liable based on sovereign immunity which the trial court sustained.

Without having had Petitioner's property declared a nuisance in fact by the court, the Town cannot claim to be exempt from the consequences of compensating Petitioner for the taking property his property as required under the Fifth Amendment of the U.S. Constitution and Section 11.1 of the Constitution of Virginia and Those expenses incurred by the Town's unauthorized action should be borne by the Town, not the Petitioner, and their lien against his property for those expenses should be removed.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests this Court to grant his Petition for Rehearing.

January 7, 2011

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

Ronald D. Morgan, *Petitioner*

CERTIFICATE OF SERVICE

I, Ronald D. Morgan, do swear or declare that on this date, January 7, 2011, as required by Supreme Court Rule 29. I have served the enclosed PETITION FOR REHEARING on counsel to the above proceeding by United States Priority Mail prepaid. His address is as follows:

Richard H. Milnor, Esq.
Zunka, Milnor, Carter & Inigo, LTD
414 Park Street
P.O. Box 1567
Charlottesville, VA 22902

Ronald D. Morgan, *Petitioner*

APPENDIX

EXHIBIT A

RESOLUTION
REGARDING OLD MINERAL ELEMENTARY SCHOOL

WHEREAS the old Mineral Elementary School buildings have been long abandoned as a school; and

WHEREAS the said buildings have been allowed to fall into an advanced state of disrepair and decay; and

WHEREAS the said buildings are located immediately adjacent to a busy public highway, to a recreational facility for children and to a residential neighborhood; and

WHEREAS the Council of the Town of Mineral has caused the said buildings to be examined by qualified inspectors and is informed that the same are in danger of collapse; and

WHEREAS it appears that the Auditorium building of the said School is in a more advanced state of disrepair and must be secured without delay, in the interest of the public safety; and

WHEREAS the Council has the power and the duty to secure the same in accordance with Section 5-4 of the Town Code and with Sections 15.2-906 and 15.2-1115 of the Code of Virginia;

NOW THEREFORE BE IT RESOLVED BY THE COUNCIL OF THE TOWN OF MINERAL as follows:

1. That the Council finds (a) that the Auditorium building of the old Mineral Elementary School is an unsafe, dangerous building which constitutes a menace to the health and safety of the public and which might endanger the public health or safety of other residents of the Town; and (b) that the owner of such property after reasonable notice and a reasonable time to do so has failed to remove, repair or secure said building; and
2. That the Town Manager be, and he is hereby, directed to cause the said building to be removed, repaired and secured, by agents or employees of the Town, first giving notice to the owner of the said building in accordance with the provisions of Town Code Section 5-4 and Virginia Code Section 15.2-906; and
3. That, in so doing, the Town Manager be, and he is hereby authorized and directed to procure proposals for the said work and to report back to Council upon such proposals, and to take such other actions as may be necessary to carry out these directives.

Adopted this 10th day of July, 2006.

A true copy, teste: _____, Clerk of Council